In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-324

EXXON CORPORATION, SHELL OIL COMPANY, AMOCO OIL COMPANY AND ATLANTIC RICHFIELD COMPANY, PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

No. 75-325

TEXAS CHEMICAL COUNCIL, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

No. 75-326

HARRIS COUNTY, TEXAS, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION

Petitioners contend that the Environmental Protection Agency lacked statutory authority to issue a regulation to control hydrocarbon vapor emissions from ships and barges in the Houston-Galveston air

quality control region and that the regulation was improperly promulgated because the Agency did not consider its economic and technological feasibility.

Section 110 of the Clean Air Act, as added by the Clean Air Amendments of 1970, 84 Stat. 1680–1683, 42 U.S.C. 1857c–5, requires that each state adopt and submit to the Administrator of the Environmental Protection Agency ("EPA") an implementation plan to maintain and enforce national ambient air quality standards. This plan must include limitations on the various sources of pollution emissions and such other measures as may be necessary, including but not limited to land-use and transportation controls, in order to achieve the ambient air standards as expeditiously as practicable, but no later than mid-1977.[1] On April 15, 1973, the State of Texas submitted its implementation plan to the EPA Administrator, who disapproved the plan both because applicable public hearing requirements had not been met and because the plan would not have adequately insured attainment of national air quality standards. 38 Fed. Reg. 16562, 16568.

---

[1] Each state was to submit an implementation plan to the EPA by January 31, 1972; the Administrator was required to approve or disapprove a state plan within four months of its submission. 42 U.S.C. 1857c–5(a)(2). The Administrator granted any state which was required to impose transportation and land-use controls until February 15, 1973, to submit those portions of its plan. 36 Fed. Reg. 15489; 37 Fed. Reg. 10844. In *National Resources Defense Council* v. *Environmental Protection Agency*, 475 F. 2d 968, 970 (C.A.D.C.), the court held that the Act did not authorize this extension. However, because of other modifications it made to the required contents of these plans, the court then gave the states until April 15, 1973, to submit the deferred portions.

BLEED THROUGH

In order to eliminate the deficiencies in the Texas plan, the Administrator published pursuant to 42 U.S.C. 1857c–5(c) a set of proposed federal regulations, including the "ship and barge loading" regulation at issue here. 38 Fed. Reg. 17799, 17808. After public hearings and a comment period, the Administrator promulgated the final plan on November 6, 1973. 38 Fed. Reg. 30633, *et seq.*

Petitioners then filed timely petitions for review of the EPA Administrator's actions in the United States Court of Appeals for the Fifth Circuit.[2] On August 7, 1974, that court held that EPA had properly disapproved the Texas plan and upheld some, but not all, of the supplementary regulations EPA had promulgated.

In regard to the questions petitioners present here, the court of appeals held that EPA had statutory authority to control hydrocarbon emissions during the loading and unloading of ships and barges using port facilities within Region 7 (Houston-Galveston) and that issuance of this regulation, 40 C.F.R. 52.2287, was not arbitrary or capricious (Exxon Pet. App. A, pp. A–50 to A–53). The court stated that the technology necessary for compliance with the ship and barge regulation was not then in existence, "although it is suggested by the technology used in controlling evaporative losses during the transfer of gasoline from tank trucks to service station tanks and then to automobiles" (*id.* at p. A–52). The court found no basis for concluding that the May 31, 1975,

[2] Twenty-five separate petitions were timely filed, but the cases were consolidated before the court of appeals (Exxon Pet. App. A, p. A–3).

compliance date was technologically feasible and stated that it "may well be that this requirement must be postponed" (*ibid.*).[3]

However, since Section 110(f) of the Clean Air Act, 42 U.S.C. 1857c–(f), contemplates promulgation of plans that require control measures of less than certain technology,[4] the court held that the regulation was not arbitrary or capricious (Exxon Pet. App. A, p. A–52). The court stated that if petitioners desire relief, they must seek this through the procedure established in Section 110(f) for obtaining a postponement of compliance dates for particular sources of emissions.[5]

1. Petitioners argue that the Clean Air Act does not authorize EPA to control hydrocarbon emissions from ships and barges during loading and unloading operations. (Exxon Pet. 14–15). Under Section 110(a)(2)(B) of the Act, 42 U.S.C. 1857c–5(a)(2)(B), any implementation plan must assure attainment of ambient standards by employing "emission limitations, * * * and such other measures as may be necessary * * * including, but not limited

[3] Although EPA intends to propose amendments to the regulation, it has not yet finished consideration of pertinent information. It has therefore postponed the final compliance date until March 1, 1976. 40 Fed. Reg. 47765.

[4] This court has recognized the validity of the "technology forcing" nature of the Act when technological development is necessary to maintain national ambient air quality standards. *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 90–91.

[5] The court of appeals denied petitions for rehearing on February 19, 1975, and April 3, 1975 (Exxon Pet. Apps. B and C). On June 27, 1975, Mr. Justice Powell granted petitioners' motion for an extension of time until August 31, 1975, for filing petitions for a writ of certiorari. The petitions for a writ of certiorari were filed on August 30, 1975.

BLEED THROUGH

to, land-use and transportation controls." After a careful review of the legislative history and regulatory scheme of the Clean Air Act, the court below correctly concluded that the regulation at issue here was authorized by the broad statutory language requiring implementation of national ambient air quality standards (Exxon Pet. App. A, p. A–51). While the final bill eliminated an earlier provision authorizing establishment of uniform national emission standards for marine sources under Title II of the Clean Air Act, 42 U.S.C. 1857f–1, *et seq.*, the EPA's authority to protect ambient air quality on a region-by-region basis, as provided in Title I of the Act, 42 U.S.C. 1857c–1, *et seq.*, is wholly independent of its responsibility to create national standards for mobile power emissions sources and is therefore not affected by limitations on the scope of Title II.[6]

2. Petitioners raise the question whether EPA must consider economic and technological feasibility when it promulgates a substitute implementation plan under the Clean Air Act (Exxon Pet. 2). That question is not, however, presented by this case. Although petitioners repeatedly assert that EPA failed to take economic and technical factors into account when it issued the ship and barge regulation, there is no support for these assertions in the opinion below. The court of appeals found only that compliance with the regulation was not then technologically possible; it did *not* find that EPA had ignored technological or economic factors (Exxon Pet. App. A, p. A–52). The rec-

[6] See 116 Cong. Rec. 42392 (1970) (remarks of Senator Muskie).

ord before the court of appeals demonstrated that EPA fully considered the feasibility of this regulation and the objections thereto. See, *e.g.*, 38 Fed. Reg. 30635–30636; see also Exxon Pet. Apps. H, I, J, K.

That compliance with the regulation is not now technologically or economically feasible in no way implies that EPA failed to consider these factors since the Act provides that regulations may properly be of a technology-forcing nature, as this Court recognized in *Train* v. *Natural Resources Defense Council*, 421 U.S. 60. Thus, EPA need not be bound by presently available technology in formulating its supplementary regulations. Moreover, the court below pointed out that despite the fact that the necessary technology is not currently available, it is suggested by existing technology in other analogous areas (Exxon Pet. App. A, p. A–52).

The regulation thus rests on a reasonable judgment that any technical or economic problem encountered in developing or applying necessary control devices could be overcome by the industry, upon which the main burden of technology-forcing regulation rests, and through existing legal mechanisms which function as safety valves should the compliance deadlines prove too stringent. Nor has EPA denied relief. As previously noted, the final compliance deadline has been extended until March 1, 1976. See note 3, *supra*. And as the Fifth Circuit pointed out, should future events ultimately prove that vapor recovery is technologically unfeasible, a postponement of the compliance date may be sought under 42 U.S.C. 1857c–5f or

the state may adopt a revision of its plan under 42 U.S.C. 1857c–5(a)(3) (Exxon Pet. App. A, pp. A–52 to A–53).[7]

For the foregoing reasons, this case does not, as petitioners contend, present an issue similar to that presented in *Union Electric Co.* v. *Environmental Protection Agency*, No. 74–1542, certiorari granted, October 6, 1975. The grant of certiorari in that case was limited to the question whether in reviewing the Administrator's approval of a state implementation plan under Section 307(b)(1) of the Clean Air Act, the court of appeals may consider technological factors which allegedly make it impossible for an emission source to comply with the regulations and economic considerations which allegedly render attempts to comply contrary to the public interest. As our memorandum in that case indicates, resolution of that question depends upon the Administrator's obligation to consider economic and technological factors in determining whether to approve a state plan.[8] In the

[7] Petitioners also argue (Exxon Pet. 10) that the ship and barge vapor emission regulation discriminates against the Houston-Galveston area. That the regulation affects only one area of a state is irrelevant, since the Clean Air Act envisions that heavily polluted areas must be subjected to more stringent implementation plans in order to achieve national ambient air quality standards (Exxon Pet. App. A, p. A–52).

[8] We argued that the Administrator is under no such duty in considering a state-submitted plan, since EPA *must* approve any such plan that meets the requirements of Section 110(a)(2), none of which impose a duty to review technological or economic factors. Furthermore, Section 116 of the Act, 42 U.S.C. 1857d–1, explicitly recognizes that a state may adopt pollution control requirements more stringent than those necessary to attain the national ambient air quality standards.

instant case, however, EPA did consider technological and economic feasibility in promulgating the supplementary regulation, so the question presented is wholly unrelated to the issue in *Union Electric.*

In any event the source of EPA's authority, the procedures properly followed and the scope of EPA's discretion are fundamentally different in approving state-submitted plans than in promulgating supplementary regulations.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
WALTER KIECHEL, JR.
Acting Assistant Attorney General.
EDMUND B. CLARK,
GEORGE R. HYDE,
Attorneys.

NOVEMBER 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975

BLEED THROUGH